Supreme Court, U.S.
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No. 92-565

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HENRY G. BARR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
ARGUMENT	1
THIS CASE IS WELL FRAMED TO PERMIT RESOLUTION OF A CONFLICT WHICH EVEN THE GOVERNMENT CONCEDES WARRANTS REVIEW	1
CONCLUSION	4

TABLE OF AUTHORITIES

Cases

Bryson v. United States, 396 U.S. 64 (1969)	3
Lefkowitz v. Cunningham, 431 U.S. 801 (1977)	2, 3
Lefkowitz v. Turley, 414 U.S. 70 (1973)	2, 3
Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962)	3
United States v. Steele, 933 F.2d 1313 (6th Cir. 1991) (*en banc*)	3

IN THE

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OCTOBER TERM, 1992

No. 92-505

HENRY G. BARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

ARGUMENT

THIS CASE IS WELL FRAMED TO PERMIT RESOLUTION OF A CONFLICT WHICH EVEN THE GOVERNMENT CONCEDES WARRANTS REVIEW.

The government agrees that irreconcilable standards regarding application of the "exculpatory no" doctrine are currently embedded in federal law; that application of these divergent standards to the same set of facts would produce a conviction in one venue and an acquittal in another; and that "the validity and scope of the 'exculpatory no' exception may warrant review by this Court." Brief, p. 8.

The Brief in Opposition concludes, however, that the Court should not accept review in this case, because it involves a government employee; and "the policy on which the exception rests . . . would not be promoted by insulating applicants for government jobs from liability for false statements they make 'in connection with their quest for employment'." Brief, p. 8.

Although that is an argument on the merits, rather than a discussion of this case's suitability as a vehicle for needed review, Petitioner would offer a brief response.

First, if the "exculpatory no" doctrine is viable as a limiting construction of section 1001, there is no principled basis for categorically excluding government employees from its application, particularly where the government inquiry carries such strong potential for incrimination. That approach would only add another layer of arbitrariness to an issue already overburdened by such factors.

Second, the argument for review is strengthened, rather than diminished, by the factual context of this case. The question and answer here were not part of an isolated or idiosyncratic dialogue. They were part of a standard government form and background investigation. Resolution of the issue in this context will have broader resonance than would be generated by any other factual scenario.

Review of the issue in a government employment context would, in addition, provide richer ground for Fifth Amendment analysis under such cases as *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) and *Lefkowitz v. Turley*, 414 U.S. 70 (1973).[1]

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[1] *See*, Petiiton for Writ of Certiorari, pp. 12-15. In its Brief in Opposition the government misconstrues Petitioner's reference to this line of cases. The government responds to *Lefkowitz* by arguing that Petitioner's false response was not unconstitutionally "coerced" and cites *Bryson v. United States*, 396 U.S. 64, 72 (1969)

Finally, it is *not* Petitioner's position before this Court that applicants for government employment should be insulated from liability for false statements made in the employment process. Petitioner argued to the courts below, and would argue to this Court, that the government's legitimate need for information regarding both current and prospective employees can be preserved by the simple expedient of placing a notice on the Standard Form 86 that any information provided will not be available for use against the respondent in subsequent criminal prosecutions.[2] Once the potential for incrimination is removed, there is no version of the "exculpatory no" doctrine that would apply to bar prosecution under section 1001.

This case is well-framed for review and resolution of an intractable conflict in federal criminal law. The most recent attempt at clarification by the lower courts—the "five-part test"—only served to exponentially advance the confusion. The extent of the crisis is evident in the Sixth Circuit's recent opinion in *United States v. Steele*, 933 F.2d 1313 (6th Cir. 1991) (*en banc*), in which review of the "exculpatory no" doctrine by the court *en banc* resulted in a 9-6 vote, five separate opinions and no resolution of the fundamental question presented regarding the doctrine's validity and scope.

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for the proposition that the Fifth Amendment does not give citizens a constitutional right to lie. Brief, p. 9. The issue presented here, however, is fundamentally one of statutory construction. From the outset of "exculpatory no" analysis, the Fifth Amendment has been used as a marker in defining the boundaries of section 1001, in large measure on the strength of the courts' conclusion that Congress did not intend the statute to reach false denials of guilt. *See, e.g., Paternostro v. United States*, 311 F.2d 298, 305 (5th Cir. 1962). If Fifth Amendment concerns furnish a valid parameter for statutory construction under section 1001, the *Lefkowitz* cases, in this context, would provide useful precedent.

[2] It should be noted here that Question 24b is the only potentially incriminating question on the Standard Form 86 and the only one, therefore, that would be affected by the "exculpatory no" doctrine.

Given the government's fundamental agreement that there exists an irreconcilable conflict requiring resolution, there is no good reason to subject either the courts or the accused to continued uncertainty and unpredictability of result in prosecutions under 18 U.S.C. § 1001. This case provides the Court with the means to resolve the question regarding the validity and scope of the "exculpatory no" doctrine. Petitioner therefore respectfully requests that a writ of certiorari issue.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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